

Question:

1. Because the money received to pay for the landscape job was gifted to the Historic Commission was it necessary for us to follow prevailing wage? The money that was given to the Commission to pay for the landscaping was in restitution for the accidental demolition of a historic barn that was on the site. There was a question regarding whether or not it would be considered money that was gifted as opposed to part of a regular stipend or allowance.

Response from Town Council:

1. With respect to the first question, namely whether prevailing wage requirements apply, it is my opinion that prevailing wage requirements do apply. In the past, we have consulted with the Division of Occupational Safety's legal counsel regarding the applicability of prevailing wages. It is the opinion of that office, virtually without exception, that prevailing wages apply to public projects. Additionally, under the logic set forth in Brasi Development Corp. v. A.G., 456 Mass.684 (2010), as well as its counterpart decisions within the Division of Occupational Safety, the so-called "balance of factors" test leads to the conclusion that prevailing wage applies. Specifically, the project will be on public land, will be subject to public control, was initiated at the behest of the public awarding authority, will have a public benefit, and will promote a public purpose. Even though a gift will be given, there is no exception under M.G.L. c. 149 (which governs prevailing wages and public construction) or M.G.L. c. 30, §39M (public works construction) for contracts that are the product of gifts or grants. (This is quite unlike M.G.L. c. 30B, where contracts for goods and services that are funded through gifts or grants are exempt from procurement regulation under the Uniform Procurement Act.) Hence, it is the view of the Division of Occupational Safety (and my view) that the money becomes public when deposited into a gift account. Consequently, because of this fact, and because of the "balance of factors" test, you will need to pay prevailing wage for the work.

Question:

2. There is no clear payment schedule outlined in the contract or bid. Are we able to pay the awarded bidder for work completed (i.e. a job done by a subcontractor) prior to the completion of the entire job? Is this something we can outline when we sit down to negotiate the contract?

Response from Town Council:

2. With regard to the second question, regarding payment of wages and schedule of payment, the bid is required to include a schedule of prevailing wages, which one would obtain from the Division of Occupational Safety, as part of the contract. As in any M.G.L. c. 30, §39M public works construction project, you are required to pay the contractor progress payments on a regular basis in accordance with M.G.L. c. 30, §39G. A copy appears below. Essentially, the Town is required to pay for work that has been done to date less a retainage (which should be specified in the contract – say 5%), less the cost of completing unsatisfactory/incomplete items. Within sixty-five days after substantial completion, the Town is required to pay the balance, less retainage of one percent, less the cost of completing incomplete/unsatisfactory work (as well as any amounts paid or deposited into escrow under the Direct Payment Statute, M.G.L. c. 30, §39F). The remainder is then paid when the work is finally complete, including any and all punch list items.

“Section 39G. Upon substantial completion of the work required by a contract with the commonwealth, or any agency or political subdivision thereof, for the construction, reconstruction, alteration, remodeling, repair or improvement of public ways, including bridges and other highway structures, sewers and, water mains, airports and other public works, the contractor shall present in writing to the awarding authority its certification that the work has been substantially completed. Within twenty-one days thereafter, the awarding authority shall present to the

contractor either a written declaration that the work has been substantially completed or an itemized list of incomplete or unsatisfactory work items required by the contract sufficient to demonstrate that the work has not been substantially completed. The awarding authority may include with such list a notice setting forth a reasonable time, which shall not in any event be prior to the contract completion date, within which the contractor must achieve substantial completion of the work. In the event that the awarding authority fails to respond, by presentation of a written declaration or itemized list as aforesaid, to the contractor's certification within the twenty-one day period, the contractor's certification shall take effect as the awarding authority's declaration that the work has been substantially completed.

Within sixty-five days after the effective date of a declaration of a substantial completion, the awarding authority shall prepare and forthwith send to the contractor for acceptance a substantial completion estimate for the quantity and price of the work done and all but one per cent retainage on that work, including the quantity, price and all but one per cent retainage for the undisputed part of each work item and extra work item in dispute but excluding the disputed part thereof, less the estimated cost of completing all incomplete and unsatisfactory work items and less the total periodic payments made to date for the work. The awarding authority also shall deduct from the substantial completion estimate an amount equal to the sum of all demands for direct payment filed by subcontractors and not yet paid to subcontractors or deposited in joint accounts pursuant to section thirty-nine F, but no contract subject to said section thirty-nine F shall contain any other provision authorizing the awarding authority to deduct any amount by virtue of claims asserted against the contract by subcontractors, material suppliers or others.

If the awarding authority fails to prepare and send to the contractor any substantial completion estimate required by this section on or before the date herein above set forth, the awarding authority shall pay to the contractor interest on the amount which would have been due to the contractor pursuant to such substantial completion estimate at the rate of three percentage points above the rediscount rate then charged by the

Federal Reserve Bank of Boston from such date to the date on which the awarding authority sends that substantial completion estimate to the contractor for acceptance or to the date of payment therefor, whichever occurs first. The awarding authority shall include the amount of such interest in the substantial completion estimate.

Within fifteen days after the effective date of the declaration of substantial completion, the awarding authority shall send to the contractor by certified mail, return receipt requested, a complete list of all incomplete or unsatisfactory work items, and, unless delayed by causes beyond his control, the contractor shall complete all such work items within forty-five days after the receipt of such list or before the then contract completion date, whichever is later. If the contractor fails to complete such work within such time, the awarding authority may, subsequent to seven days' written notice to the contractor by certified mail, return receipt requested, terminate the contract and complete the incomplete or unsatisfactory work items and charge the cost of same to the contractor.

Within thirty days after receipt by the awarding authority of a notice from the contractor stating that all of the work required by the contract has been completed, the awarding authority shall prepare and forthwith send to the contractor for acceptance a final estimate for the quantity and price of the work done and all retainage on that work less all payments made to date, unless the awarding authority's inspection shows that work items required by the contract remain incomplete or unsatisfactory, or that documentation required by the contract has not been completed. If the awarding authority fails to prepare and send to the contractor the final estimate within thirty days after receipt of notice of completion, the awarding authority shall pay to the contractor interest on the amount which would have been due to the contractor pursuant to such final estimate at the rate hereinabove provided from the thirtieth day after such completion until the date on which the awarding authority sends the final estimate to the contractor for acceptance or the date of payment therefor, whichever occurs first, provided that the awarding authority's inspection shows that no work items required by the contract remain incomplete or unsatisfactory.

Interest shall not be paid hereunder on amounts for which interest is required to be paid in connection with the substantial completion estimate as hereinabove provided. The awarding authority shall include the amount of the interest required to be paid hereunder in the final estimate.

The awarding authority shall pay the amount due pursuant to any substantial completion or final estimate within thirty-five days after receipt of written acceptance for such estimate from the contractor and shall pay interest on the amount due pursuant to such estimate at the rate hereinabove provided from that thirty-fifth day to the date of payment. Within 15 days, 30 days in the case of the commonwealth, after receipt from the contractor, at the place designated by the awarding authority, if such place is so designated, of a periodic estimate requesting payment of the amount due for the preceding periodic estimate period, the awarding authority shall make a periodic payment to the contractor for the work performed during the preceding periodic estimate period and for the materials not incorporated in the work but delivered and suitably stored at the site, or at some location agreed upon in writing, to which the contractor has title or to which a subcontractor has title and has authorized the contractor to transfer title to the awarding authority, upon certification by the contractor that he is the lawful owner and that the materials are free from all encumbrances. The awarding authority shall include with each such payment interest on the amount due pursuant to such periodic estimate at the rate herein above provided from the due date. In the case of periodic payments, the contracting authority may deduct from its payment a retention based on its estimate of the fair value of its claims against the contractor, a retention for direct payments to subcontractors based on demands for same in accordance with the provisions of section thirty-nine F, and a retention to secure satisfactory performance of the contractual work not exceeding five per cent of the approved amount of any periodic payment, and the same right to retention shall apply to bonded subcontractors entitled to direct payment under section thirty-nine F of chapter thirty; provided, that a five per cent value of all items that are planted in the ground shall be deducted from the periodic payments until final acceptance.

No periodic, substantial completion or final estimate or acceptance or payment thereof shall bar a contractor from reserving all rights to dispute the quantity and amount of, or the failure of the awarding authority to approve a quantity and amount of, all or part of any work item or extra work item.

Substantial completion, for the purposes of this section, shall mean either that the work required by the contract has been completed except for work having a contract price of less than one per cent of the then adjusted total contract price, or substantially all of the work has been completed and opened to public use except for minor incomplete or unsatisfactory work items that do not materially impair the usefulness of the work required by the contract.”

Question:

3. In the proposal it states the parking area is to be edged in reclaimed granite curbing. Is the granite on site?

Response Landscape Designer:

3. No there are only two posts that have been reclaimed and will be placed by the contractor on either side of the entrance in order to run a length of chain to close the entrance at night.

There are several locations in the state that sell reclaimed granite curbing. Rough-cut granite curbing was the desired look for the site in keeping with the actual time the building was in use.